# In the Supreme Court of the United States.

OCTOBER TERM, 1900.

JOHN GLAVEY, APPELLANT,
*v.*
THE UNITED STATES. } No. 235.

APPEAL FROM THE COURT OF CLAIMS.

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

Prior to the act of August 7, 1882, chapter 441 (22 Stat., 346), no statute authorized the inspection of foreign private steam vessels carrying passengers from ports of the United States to other places or countries. That act amended section 4400 of the Revised Statutes so as to require the inspection of such vessels, and it provided, among other things, for the appointment by the Secretary of the Treasury of sixteen officers to be designated as special inspectors of foreign steam vessels, at a salary of $2,000 a year each, as follows: At the port of New York, six; at the port of Boston, two; at the port of Baltimore, two; at the port of Philadelphia, two; at the port of New Orleans, two; at the port of San Francisco, two. No fees were chargeable for such inspections, and the salaries of

the officers were payable out of a permanent appropriation made by section 6 of the act. Each of the inspectors so authorized was required to take an oath of office and execute a proper bond, to be approved by the Secretary of the Treasury, in such form and upon such conditions as the Secretary should prescribe, for the faithful performance of the duties of his office. Sections 2 to 6 of this act, which authorized the appointment and salaries of these special inspectors of foreign steam vessels, were repealed by the act of March 1, 1895, chapter 146 (28 Stat., 699), after repeated recommendations of the Secretary of the Treasury, on the grounds that the offices so created were "virtually sinecures," and that the inspection of foreign steam vessels could be made by the inspectors of domestic vessels. Secretary Windom so recommended in his Annual Report on the State of the Finances for the year 1889, page cii, and therein stated that the services of three of these officers had already been dispensed with.* By reference to Finding

*The action in Congress upon this recommendation was the introduction of a bill (S. 1752), on January 7, 1890, by Senator Frye, to abolish the unnecessary offices, and for other purposes, which was referred to the Committee on Commerce and favorably reported back on the 16th of the same month (Congressional Record, Senate Report No. 113, Fifty-first Congress, first session). This bill did not become a law, but its provisions for the abolishment of the unnecessary offices were exactly the same as those contained in the above-cited act of March 1, 1895. In regard to the provisions of the bill that became that act, Senator Frye said on February 21, 1895:

> A similar bill passed the Senate three times, and finally the House concluded to take it up, and it has

III (R., 5) and the Annual Report of the Supervising Inspector-General of Steam Vessels for the same year to the Secretary of the Treasury (p. 24) it will be seen that the services of the inspectors of foreign steam vessels at the ports of Philadelphia, New Orleans, and San Francisco had been dispensed with "by an order of the Secretary," on the grounds that their offices "were merely sinecures," and that the "nominal duties" of the offices were being performed by the local inspectors of domestic vessels "acting" as inspectors of foreign steam vessels, the result being a saving of the salaries of the foreign inspectors at those ports.

The like recommendation to abolish all the sinecure offices was made to Congress by Secretary Foster on December 7, 1891, in his Annual Report on the State of the Finances for that year. He said:

> The services of the officers known as special foreign inspectors have been dispensed with, and the work is all done by the officers of the

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passed under suspension of the rules (Congressional Record, Fifty-third Congress, third session, p. 2490).

It is therefore apparent that during the whole period of appellant's term of office as *local inspector of hulls* at New Orleans the Congress was fully informed not only by the annual reports of the Secretary of the Treasury but also by committee reports on bills, that the offices of special inspectors of foreign steam vessels were practically sinecures, and that for that reason they were vacant and the duties thereof were being performed by the regular domestic inspectors without additional compensation. It was for this reason that the offices were not abolished during the Fifty-first Congress. The delay was caused by other amendments required in the inspection laws.

> domestic service under special appointments as acting special inspectors without pay, thereby saving the salaries formerly paid the special inspectors. (Page lxx.)

On April 17 of the last-mentioned year the same Secretary of the Treasury, or his Assistant, had appointed the appellant to the office of local inspector of hulls of steam vessels for the district of New Orleans, La., as set forth in the findings of facts (R., 3, 4); and on May 15 following, the same Secretary directed him, by a letter, which is not in the regular form of an appointment to office, to "serve," in connection with his appointment as *local inspector of hulls* of steam vessels, as a *special inspector of foreign steam vessels*, without additional compensation, for the port of New Orleans (R., 5). Appellant took the oath of office as directed in the letter, and served in that capacity, without protest or objection, until he ceased to hold the office of inspector of hulls, on May 27, 1894, by the appointment and qualification of a successor in that office (R., 7). During that entire period he was not required to give the bond prescribed by the abovesaid act of August 7, 1882, nor did he at any time give or offer to give such bond.

While so performing the duties of inspector of foreign steam vessels, appellant never made any application or demand to be paid the salary prescribed by said act for that office, but, on the other hand, he regularly sent in his monthly accounts for compensation as local inspector of hulls of steam vessels to the Treasury Depart-

ment, and those accounts were settled and paid monthly. (Finding I, R., 4.) He ceased to perform the duties of an inspector of foreign steam vessels on May 27, 1884, when he ceased to hold the office of local inspector of hulls at New Orleans (R. 7), and if he ever held the office of inspector of foreign steam vessels his resignation ~~as such~~ of that officer was never ~~called~~ tendered for, nor was he ever expressly removed therefrom. In this situation of the case appellant sues to recover the salary prescribed by the statute for the office of special inspector of foreign steam vessels at the port of New Orleans, La., but the demand is modestly limited to the period of his tenure of the office of local inspector of hulls.

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We supplement this statement by respectfully referring to the following facts not in the record, but of which the court may take judicial notice (*Jones* v. *United States*, 137 U. S., 202, 216), for the purpose of showing a copy of an appointment to the office of special inspector of foreign steam vessels and a copy of an official bond for that office, each in the usual form:

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
*Washington, D. C., December 21, 1882.*

Mr. THOMAS H. BARRETT,
*New York City, New York.*

SIR: Under the provisions of the act of Congress approved August 7, 1882, entitled "An act to amend section forty-four hundred, title fifty-two, of the Revised Statutes of the United

States, concerning the regulation of steam vessels," you are hereby appointed a special inspector of boilers of foreign steam vessels at the port of New York, at a compensation of two thousand dollars per annum, the appointment to take effect from date of oath.

You will execute a bond in the penal sum of three thousand dollars.

Very respectfully,

CHAS. J. FOLGER,
*Secretary.*

SPECIAL INSPECTOR OF FOREIGN STEAM-VESSELS' BOND.

(Section 4400, Revised Statutes U. S.—Act approved August 7, 1882.)

Know all men by these presents, that we, Thomas H. Barrett, of New York City, principal, and James G. Cooper, of Brooklyn, New York, and Bartholomew Donegan, of Brooklyn, New York, sureties, are held and firmly bound unto the United States of America in the full and just sum of three thousand dollars, money of the United States, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents Sealed with our seals, and dated this twenty-ninth day of December, in the year one thousand eight hundred and eighty-two.

The condition of the foregoing obligation is such, that whereas the said Thomas H. Barrett has been appointed by the Secretary of the Treasury, under the provisions of the act amend-

ing section 4400, Revised Statutes of the United States, approved August 7, 1882, a special inspector of foreign steam vessels at the port of New York, State of New York: Now, if the said Thomas H. Barrett shall well and faithfully perform the duties of the said office as required by law and the regulations of the Treasury Department, and make reports thereof to the Supervising Inspector-General of Steam Vessels, under such regulations as are or may be prescribed by the Secretary of the Treasury, and shall duly account for all money or public property with which he may be intrusted, or which may come into his hands, then this obligation to be of no effect; but otherwise to remain in full force and virtue in law.

THOMAS H. BARRETT. [SEAL.]
JAMES G. COOPER. [SEAL.]
BARTHOLOMEW DONEGAN. [SEAL.]

Sealed and delivered in presence of—
JAMES STROUD.
JOHN A. OSBORN.

UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, second circuit, do hereby certify that I am well acquainted with the handwriting of John A. Osborn, whose name is subscribed to the annexed affidavits, and that the signature to the same is in his proper handwriting. And I do further certify that he was at the time of signing the same a United States commissioner, duly appointed by

the circuit court of the United States of America for the southern district of New York, second circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court this 29th day of December, in the year of our Lord one thousand eight hundred and eighty-two and of the Independence of these United States the hundred and seventh.

JOSEPH M. DEUEL, *Clerk.*

[Seal of U. S. circuit court, south. dist. New York.]

I, James G. Cooper, being duly sworn, depose and say that I am worth the sum of six thousand dollars over and above all my just debts and liabilities, exclusive of property exempt by law from execution.

JAMES G. COOPER.

Sworn and subscribed before me this 29th day of December, A. D. 1882.

JOHN A. OSBORN,
*United States Commissioner, S. D., N. Y.*

I, Bartholomew Donegan, being duly sworn, depose and say that I am worth the sum of six thousand dollars over and above all my just debts and liabilities, exclusive of property exempt by law from execution.

BARTHOLOMEW DONEGAN.

Subscribed and sworn before me this 29th day of December, A. D. 1882.

JOHN A. OSBORN,
*United States Commissioner, S. D., N. Y.*

CITY AND COUNTY OF NEW YORK, *ss:*

I hereby certify that James G. Cooper and Bartholomew Donegan, the sureties in the within bond, are personally known to me; that they are citizens of the United States and residents of Brooklyn, New York, and that they are good and sufficient to pay the penalty of said bond.

W. U. ROBERTSON,
*Collector of Customs.*

[Instructions.]

The chief officer of customs certifying to the within bond is required to see that the following instructions are particularly observed and complied with, viz:

1st. The Christian names must be written in the body of the bond in full, and so signed to the bond.

2d. A seal of wax or wafer to be attached to each signature.

3d. Each signature must be made in the presence of two persons, who must sign their names as witnesses.

4th. Each surety must make and sign an affidavit of the amount he is worth after paying his just debts, describing his property to the extent of his liability.

5th. The collector or chief officer of the customs must certify that the sureties are sufficient to pay the penalty of the bond.

6th. The affidavits of the sureties must be taken and signed before an officer authorized to administer oaths generally. The officer must certify that he administered the oaths. If the magistrate is not a judge of the United States

court, his authority to administer oaths must be certified by the clerk of a court of record having official knowledge of that fact.

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GROUNDS OF DEFENSE.

The argument of the learned counsel for the appellant in this case is based upon the general principle that when an office with a fixed salary has been created by statute, and a person duly appointed to that office has qualified therefor and entered upon the discharge of his duties, he is entitled in law to be paid the salary thereof during his incumbency of the office.

We fully admit this principle, but our contention is that it is not applicable to the case at bar, for the following reasons:

1. It was not the intention of the Secretary of the Treasury to appoint appellant to the office of special inspector of foreign steam vessels at the port of New Orleans when he signed the letter of May 15, 1891. This fact is established by the above-cited annual finance reports to Congress.

2. If the court should consider that letter as a valid appointment to the office of special inspector of foreign steam vessels, nevertheless, as appellant did not at any time qualify therefor as required by law, in that he did not give or tender the official bond prescribed in the act which created that office, his tenure was *de facto* and not *de jure*, and he acquired no legal title to the salary of the office.

3. If the court should consider that the giving of an official bond, or its tender, was not a necessary qualification for said office, nevertheless appellant is not entitled to the salary thereof, because he waived all right and title to that salary by accepting the appointment upon the condition therein stated, and he is now estopped from demanding the said salary.

## POINTS OF ARGUMENT.

### I.

The so-called appointment to the office of special inspector of foreign steam vessels is on its face merely an administrative direction from the head of the Treasury Department, which imposed upon the appellant, as local inspector of hulls of steam vessels, the duties of a special inspector of foreign steam vessels "without additional compensation." It is wholly defective as a commission in that it expressly withholds one of the necessary incidents of an office of profit, namely, salary. (*United States* v. *Hartwell*, 6 Wall., 385.)

The statement of the Secretary of the Treasury in that letter, that the appointment would "take effect from the date of oath," was evidently made upon the supposition that an official oath was a necessary qualification to enable a local inspector of hulls to perform the duties of a special inspector of foreign steam vessels. Similarly, the statement that appellant would not be entitled to additional compensation for the performance of those duties was unnecessary, because, as the honorable court are well aware, it is a common and

lawful practice in the various Executive Departments of the Government for the heads thereof to require one officer to perform the duties of another office during the absence or disability of its incumbent, or a vacancy therein, or where upon economical grounds the office may be left in abeyance. In such case it must be assumed that the head of the Department acted according to the interests and requirements of the public service.

Although it is generally conceded that public offices should not be left in abeyance, nevertheless the practice referred to is recognized in the various statutes which prohibit the payment of extra compensation in such cases to the officer performing the duties of the other office (Rev. Stats., 1763–1765). Therefore there can be no question whatever respecting the legality or propriety of the practice, or of the validity of the notice to the claimant that he would not be allowed any extra compensation. Indeed, as above stated, the notice was wholly unnecessary, because the statutes expressly forbid extra compensation in all such cases. The question of the right to the salary of the other office has been so often before this court that it would be a waste of time to dwell upon this feature of the case.

THE ISSUE.

Practically the issue resolves itself into the question: Did the Secretary of the Treasury intend to appoint appellant to the office of special inspector of foreign steam vessels? Evidently the answer must be that the letter of the Secretary is not such an appointment

or commission as the law contemplated, because it expressly excluded one very important feature which otherwise might be implied, namely, the right to the emoluments of the office. In this view of the case, and as showing the intention of the Secretary not to make an appointment to the office in the legal sense of the term, there is the fact that the letter of May 15, 1891, is not in the usual form of an appointment to that office (see usual form, *ante*); and that he did not require a bond;—a security which he could not waive under an appointment to the office—and also the fact that he and his predecessor, Secretary Windom, reported to Congress that the office would remain vacant. Besides this, there is the additional fact that appellant himself never regarded the letter as an appointment to office. The proof of that fact is his conduct; he never made any demand for the salary of the office while he acted in the capacity of special inspector of foreign steam vessels, and he never attempted to fully qualify as a duly appointed officer by giving, or at least tendering, the official bond prescribed by the statute. In addition to this is the fact that during the whole period for which the salary is now claimed he promptly and regularly demanded and was paid each month his salary as local inspector of hulls of steam vessels. And in addition to all this, the fact is that when he ceased to hold the last-mentioned office by the appointment and qualification of a successor therein, he at no time thereafter claimed or pretended to hold the office of special inspector of foreign steam

vessels or performed or offered to perform any of its duties. On the contrary, when he ceased to hold the office of local inspector of hulls, he did not regard said letter of May 15, 1891, as authorizing him to continue to perform the duties of a special inspector of foreign steam vessels, although he never resigned that office or was removed therefrom.

II.

If the court should consider that the above-mentioned letter was a valid appointment to the office of special inspector of foreign steam vessels, the most that can be said of appellant's position is that he was an officer *de facto* and not *de jure*, because he did not qualify, as the statute required, by giving an official bond or tendering it.

In *Williams* v. *United States* (23 C. Cls. R., 46), the Court of Claims held that until an official bond is given, when that security for official conduct is prescribed by statute, the appointee to an office is not invested with the office or entitled to the salary thereof. In that case the claimant had offered to comply with all the conditions of the statute, and his counsel admitted that while the provision for the giving of an official bond should be considered as directory, nevertheless it is a condition precedent to the vesting of a legal right to the emoluments of the office. "In this view," said he, "the requirement of giving a bond can be regarded as of no higher dignity than as a part of the contract upon which the salary can be paid."

Again, in *Delaney* v. *United States* (31 C. Cls. R., 44, 61), the same court quoted with approval the language of the Attorney-General in an opinion requested by the State Department respecting a consular office, in which he said:

> Every person appointed to an office of that kind has preliminary duties to perform before he leaves the country; and after he has taken the official obligation in the manner prescribed by law, as by making oath and giving bond, the time and labor devoted to these preliminary duties, as well as the time occupied in reaching his official post, are just as much spent in the public service as though he were already at that post exercising its more important functions.

Here we see that the making of an oath and the giving of a bond are considered as "official obligations," and that the appointee is not regarded as an officer *de jure* until those obligations have been taken. But he is an officer *de jure* when he qualifies by taking the oath and giving the bond. (*United States* v. *Delaney*, 164, U. S., 282, 284; and *The Queen* v. *The Mayor of Cambridge*, 12 Ad. and Ell., 702, 712.)

It is true that in *United States* v. *Bradley* (10 Peters, 343), *United States* v. *Linn* (15 ib., 290), *United States* v. *Le Baron* (19 How., 73), and other cases that might be cited, the statute expressly prescribed that the bond should be given *before* entering upon the duties of the office, and that this court held that the requirement was directory, and that the right to salary vested from the date of entry on duty. Nevertheless it is to be remembered that in all such cases official bonds were given

within a reasonable time, and we have no case in the reports which holds that the giving of an official bond, when required by statute, is not one of the necessary qualifications for full investure of office and right to salary, nor any case where it is held that when the appointee failed or refused to give the statutory bond he was an officer *de jure*, and as such entitled to the salary and emoluments of the office. Again, it is to be observed that in all suits on official bonds there is a recital in those instruments that the principal has been appointed to the office named therein; therefore the sureties were estopped from pleading that he was not such an officer until his bond was accepted.

Nor upon the point in issue can the case of *United States* v. *Eaton* (169 U. S., 331) be distinguished from those cases, because in each an official bond had been given within a reasonable time after appointment, the taking of oath of office, and the entry of the incumbent upon his official duties. In fact, Eaton gave two official bonds. He was appointed to office on June 23, 1892, took the oath of office the same day, and entered upon the full discharge of his duties on July 12, 1892. He gave the first bond on September 2, 1892, and the second on January 24, 1893—each by directions from the State Department; and by the same directions, and with the consent of the sureties, each bond was dated back to June 13, 1892—that being the day when he began to act in the office at the request of Boyd, the minister resident and consul-general of the United States, who was then taken seriously ill and so continued until July 12, 1892, when he departed on his

voyage home to the United States, and left Eaton in full charge of the office.

It was contended for the appellants in that case that the Court of Claims erred in giving judgment in favor of Eaton for salary "for a period during which he performed the duties of the office before his official bond was received and approved." The Court of Claims had allowed compensation to Eaton for the period from July 12, 1892, and this court affirmed that allowance.

If there be anything in the language of the learned opinion delivered by Mr. Justice White in that case which might be construed as holding that the giving of an official bond prescribed by statute is so merely directory that compliance with the statute is not a necessary qualification for office, and that the bond may be wholly dispensed with in respect to the incumbent's right to the salary of the office, it is to be remembered that the language of judicial opinions is to be confined to the subject-matters discussed in them. To so hold would leave a loophole for an evasion of the statute not contemplated by Congress.

In *United States* v. *Linn* (15 Peters, 313) this court evidently regarded the giving of an official bond, when required by statute, or other security equivalent thereto, as a condition precedent to the full investiture of office. In that case, referring to *United States* v. *Bradley*, Mr. Justice Thompson, delivering the opinion of the court, said:

> According to this doctrine, which is undoubtedly sound, Linn was a receiver, *de jure* as well

> as *de facto*, when the instrument in question was given. And although the law requiring security was directory to the officers intrusted with taking such security, Linn was under a legal as well as moral obligation to give the security required by law.

The court considered that the instrument given was a sufficient compliance with the statute, although it was not sealed.

In *United States* v. *Flanders* (112 U. S., 91), referring to a statute which required an oath of office and bond before entry upon the duties of an office, Mr. Justice Blatchford, delivering the opinion of the court, said:

> But, we are of opinion that the statute is satisfied by holding that his title to receive, or retain, or hold, or appropriate the commissions as compensation does not arise until he takes and subscribes the oath or affirmation, but that when he does so his compensation is to be computed on moneys collected by him from the time when, under his appointment, he began to perform services as collector, which the Government accepted, provided he has paid over and accounted for such moneys.

In that case the official bond was given when the oath was taken. Therefore it may be said, when 'the official bond is given, the statute is satisfied by holding that the officer is entitled to be paid his salary for the period during which he performed the duties of his office.'

In principle there can be no distinction between a case where the statute prescribes *generally* the taking

of an oath or the giving of a bond as a qualification for office, and one where the statute expressly directs an oath to be taken or a bond to be given *before* entering upon the duties of an office. Where, as in the case at bar, the statute is silent as to the time for giving the bond, it must be complied with as fully as if it had prescribed the time for giving it. The statute contemplates in either case that the officer should be under certain obligations in regard to the performance of his official duty, namely, the sanction of an oath of office and a bonded liability, and until the statute is satisfied the incumbent is not an officer *de jure*. Speaking of qualification for office in the case of *United States* v. *Delany* (164 U. S., 282, 284), this court said of appellee, "He had qualified by taking the oath of office and giving the bond required by law."

The learned counsel for appellant argue in their brief (p. 14) that it would be "a dangerous proposition" to hold that when an official bond is required by statute in respect to an office, the appointee is not an officer *de jure* until he gives the bond, because it would "lend countenance to any such defense for defaulting officers of the United States." The very next paragraph of the brief is a sufficient answer to the supposed danger: "The contrary has been held even when the statute required a bond to be given *before entering* on the duties of the office." Of course a *de facto* officer is under legal liabilities, and is responsible for his conduct in the office. This is also the answer to the suggestion in the dissenting opinion (R., 17) that "The

Secretary's letter of appointment should not be construed as an order assigning to duty a man who was not an inspector in law or in fact to examine the vessels of private owners and subject them to the 'visitation' and penalties prescribed by the Revised Statutes, sections 4407, 4418, 4421, 4423, and 4424." It is an everyday occurrence for a duly designated officer to perform the duties of a vacant office. As to the latter office he is, of course, the officer *de facto* for the time being, and can exercise all its functions, and by the express statutory provisions, above cited, he has no right to the emoluments of the vacant office. It is therefore unnecessary to contend that, as a principle of law, a mere *de facto* officer is not entitled to the salary of the office. No one ever supposed that in such a case the *de facto* officer acted under duress.

III.

If the appellant was in fact legally appointed to the office of special inspector of foreign steam vessels, and if the Secretary of the Treasury had the power to waive the giving of an official bond prescribed by statute, or if the failure of appellant to give or offer to give an official bond did not debar him from claiming the salary of that office, nevertheless he can not now recover the salary claimed, because he accepted the appointment upon the express condition that he would serve as a special inspector of foreign steam vessels *without additional compensation in connection with his appointment as local inspector of hulls of steam vessels.*

There is no question here of the right to hold two compatible offices and be paid the salary of each office. (*United States* v. *Saunders*, 120 U. S., 126.) The facts in this case present an entirely different question, namely, Whether when the head of a Department, in a letter in the form of an appointment addressed to a subordinate officer having a fixed salary, directed the latter to perform the duties of another compatible salaried office which was regarded as a sinecure, without compensation in connection with his own office, and that officer, without any objection or protest whatever, proceeded to perform the few additional duties so imposed upon him, and by his conduct leads the head of the Department to believe that he has agreed to the conditions named in the letter, and then performed the additional duties in connection with his regular official duties for a period of three years and twenty-seven days without claiming any salary or other compensation during that time for the performance of those occasional duties, the law vests the officer with the right to recover the salary of the other office?

Of course, there can be but one answer to this question, namely, that, in such case, the statutes expressly forbid the payment of any compensation whatever to the officer in addition to his regular salary.

ESTOPPEL.

But assuming for a moment that, by literal construction, the letter of May 15, 1891, may be regarded as a commission or appointment to the office of special inspector of foreign steam vessels, and that the

Secretary of the Treasury had no legal right to exact a condition that the appointed officer must serve without salary, does it follow, on the facts of the case, that the claimant can now recover the salary of the office? We submit that he can not, because—

1. He never qualified as an officer *de jure*.

2. He is estopped from now claiming said salary.

It is unnecessary to further argue the first objection. If it should be held untenable, the second objection must stand.

The doctrine of estoppel is not favored, nevertheless it is often enforced. The books are full of cases where parties, by their silence or misleading conduct, were held to have waived their legal rights. It is true that, as a general rule, a waiver will not stand against an illegal contract, or against public policy, or without some valuable consideration to sustain it, and it has been said that the maxim "Silence shows consent" has been much abused. (*Hatch* v. *Benton*, 6 Barb., 35.) Nevertheless it is a rule, both of law and equity (*Wehrman* v. *Conklin*, 155 U. S., 314, 327), that when a party by his silence seems to consent to a waiver of his right, and has thereby misled the other party, he is estopped from asserting the right. Can any good reason be given why this rule should not be in force in respect to executive administration as well as judicial proceedings? It is true that in the former no one is authorized to waive the rights of the Government without the authority of a statute. But there can be no question that an individual can waive his own rights—even constitutional rights, much more a statutory right. (*In re Belt*, 159

U. S., 95, 99.) For example, in judicial proceedings certain well-secured rights are often waived, and held as waived, because not seasonably asserted. Diligence and good faith so require. Even in criminal cases waiver by silence is sustained against defendants when they go on trial without a copy of the indictment or of the panel of the jury, or when counsel was not assigned to them, or by becoming witnesses in their own behalf, or where the jury was not polled, or when former jeopardy was not pleaded. If it should be said that the agreement between the Secretary and appellant was an illegal contract, and that therefore the latter is not estopped from demanding the salary now claimed, the answer is—if we consider the matter as a contract at all—that appellant voluntarily agreed to its terms; he was as much a party to it as the Secretary of the Treasury; he has not pleaded duress; and certainly, without an express finding of duress as a fact in the case, this court will not assume that Secretary Foster ever put any subordinate officer of his Department in fear of dismissal from office without aggravated cause therefor. It is rather to be assumed that appellant was quite willing to comply with the Secretary's instructions in every respect. But where is there any illegality in such a contract? It would be new doctrine in this court that an agreement between a salaried officer and the head of his department to perform the duties of another office without additional compensation is an illegal contract, or in any respect in contravention of public policy, in view of the statutes which expressly recognize such agreements.

There is no case in the reports to sustain the proposition that the incumbent of a sinecure office can not waive his right to the salary thereof.

We do not admit that the question of contract or of waiver arises on the merits of this case; but if the court should determine otherwise, our defense is no less valid.

It is but stating elementary law to say that waiver is a voluntary relinquishment of some right, a foregoing or giving up of some benefit or advantage which, but for such waiver, one would have enjoyed.

The question of waiver is therefore to some extent a question of fact. It may be proved by various species of proofs and evidence, by express declarations, or by acts manifesting an intent and purpose not to claim an advantage, by nonfeasance, or forbearing to claim or act, or by a course of acts and conduct to induce a belief that there was an intention and purpose to waive the right or advantage. Voluntary choice not to claim is of the essence of waiver and not mere negligence, though from *negligence unexplained* such intention may be inferred. This is the law of waiver as expounded by Chief Justice Shaw in *Farlow* v. *Ellis and another* (15 Mass., 229, 231).

And the same doctrine is stated in *Simmons* v. *Burlington, etc., Railway Co.* (159 U. S., 278, 291). Mr. Justice Shiras, delivering the opinion of this court in that case, said:

> The rule is aptly expressed by 2 Pomeroy's Eq. Jur., par. 816, as follows: "Acquiescence is

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an important factor in determining equitable rights and remedies in obedience to the maxims: He who seeks equity must do equity, and he who comes into equity must come with clean hands. Even when it does not work a true estoppel upon rights of property or of contract, it may operate in analogy to estoppel—may produce a *quasi* estoppel—upon the rights of remedy." And in par. 965: "When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. Even where there has been no act nor language properly amounting to an acquiescence, a mere delay, a mere suffering time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of actual and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands; laches are often a defense wholly independent of the statute of limitations."

In the case at bar we have the very essence of a waiver: Voluntary choice to accept an appointment to an office with a salary attached to it by law, and a tacit agreement not to claim that salary as long as he would be called upon to perform the mere nominal duties of that office in connection with another office for which he was being paid a competent salary.

If the honorable court should determine that in contemplation of law the appellant was appointed to and fully qualified for the office of special inspector of foreign steam vessels, they must, we respectfully submit, also conclude that he waived all right, title, and interest to and in the salary of that office, and that he is now estopped from maintaining a suit therefor against the United States. Acquiescence and waiver are always questions of fact, and the conclusion of the court below is necessarily based either upon that fact or the fact that appellant was never appointed to the office of special inspector of foreign steam vessels. No attempt has been made to explain his long silence in respect to the salary now claimed. If, while in office as local inspector, he considered that he had a legal right to the salary of the other office, why did not he demand it in seasonable time? It is not enough for him to say that the law allowed him the right to sue for it within the statutory period of six years from the time it became due.

The statutes, not to speak of general principles, require diligence and good faith on the part of public officers in the matter of rendering accounts for the pay-

ment of their salaries. It is expressly prescribed that salary accounts should be rendered to the officers whose duty it is to pay them, and that the latter shall render their disbursement accounts to the accounting officers at the end of each quarter of the fiscal year, to be settled promptly, so that the Secretary of the Treasury may be enabled to render to Congress each year a report of the expenditure of all moneys appropriated for the public service for the preceding fiscal year. The Secretary is charged by law to "cause all accounts of the expenditure of public money to be settled within each fiscal year, except when the distance of the places where such expenditure occurs may be such as to make further time necessary." (Rev. Stat., secs. 250, 3622, 3625.)

The statutes are very stringent in their requirements for the prompt settlement of all accounts and claims for which appropriations are annually made by Congress. No explanation consistent with good faith has been made of appellant's conduct in so carefully refraining for over three years from rendering monthly to the Treasury Department accounts for the salary of a special inspector of foreign steam vessels. His silence was wholly inconsistent with any other theory than that he never regarded the letter set forth in the findings of fact as an appointment to any office. He never presumed for a moment to act as such officer after he ceased to hold the office of local inspector of hulls. He carefully refrained, while he held the office of local inspector of hulls, from giving the Secretary of the

Treasury the slightest intimation that he considered himself as legally possessed of the office of a special inspector of foreign steam vessels. He never had a thought that he held that office until he ceased to perform its duties. He never up to that time thought that he had been appointed to it, because if it had occurred to him he would have continued to perform its duties until formally removed from it, and he never was. The claim for salary was an afterthought, suggested by the idea that possibly it might be held, by some legal technicality, that the letter of the Secretary might be construed as an appointment to office and that the condition to serve without salary would be held illegal, and therefore that he might possibly recover a judgment for the salary in the Court of Claims.

IV.

There is a reference in the majority opinion, and also in the dissenting opinion sent up with the record, to the provision of the urgent deficiency act of May 1, 1884 (23 Stat. L., 17), which says that—

> Hereafter no department or officer of the United States shall accept voluntary service for the Government * * *.

This prohibition has no application to the present case, but if it had, it would bear against the appellant, because he could found no legal right on a violation of law to which he was himself an agreeing party. The prohibition was an amendment of the House bill, put on in the Senate with the avowed purpose of supplementing that provision in the legislative, executive,

and judicial appropriation act of March 3, 1883, sec. 4 (22 Stat. L., 531, 563), which says—

> That the heads of the departments may by special order, stating the reason, further extend or limit the hours of service of any clerk or employee in their departments, respectively, but in case of an extension it shall be without additional compensation. * * *

This was the explanation of the amendment which was made by Mr. Randall, who had charge of the bill in the House, and that body then receded from their objection to it (Cong. Rec., Forty-eighth Congress, first session, pp. 2143, 2219, 3392, 3410). While the amendment would seem to have been unnecessary legislation, in view of the former prohibition, it certainly was not intended to create or enlarge or sanction any right to salary or extra compensation in any case. It was intended to discountenance the practice of some industrious clerks of unnecessarily working beyond office hours in the Departments, and then making such extra work an equitable foundation for a claim upon Congress for additional compensation. It resembles the eight-hour law in some respects—work overtime is discountenanced and no pay is permitted for overtime work, whether rendered voluntarily or by direction of the head of a Department.

To sum up the grounds of defense we say,—with the very highest respect for the strong dissenting opinion in the court below, supported as it is by the concurrence of the learned circuit judge in *Miller* v. *The*

*United States* (104 Fed. Rep., 415), and with full appreciation of the able argument of the distinguished counsel on the other side,—that the appellant never was appointed to the office of special inspector of foreign steam vessels. But if this honorable court should hold otherwise, to wit, that he was legally appointed to that office, then our defense is that he never qualified for the office, that he waived all right and title to the salary prescribed by law therefor, and that he is therefore estopped from maintaining this suit.

Respectfully submitted.

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